No. 93-792

In The

Supreme Court of the United States

October Term

SILVEY REFRIGERATED CARRIERS, INC.,

Petitioner,

v.

H.J. HEINZ COMPANY,

Respondent.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. AUGELLO*
MARIANNE ROWDEN
AUGELLO, PIZOLD & HIRSCHMANN
24 Woodbine Avenue, Suite 8
Northport, New York 11768
(516) 261-0100

*Counsel of Record

February 11, 1994

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, the decision of the United States District Court for the Western District of Pennsylvania, and the Magistrate's Report all appear as Appendices in the Petition for Certiorari.

STATEMENT OF THE CASE

This case involves an undercharge action filed by Silvey Refrigerated Carriers, Inc. (hereinafter "Silvey")

against Respondent ("H.J. Heinz"). Upon cross motions for summary judgment, the District Court for the Western District of Pennsylvania referred the issue to the United States Magistrate. The Magistrate held that the tariffs upon which Silvey based its undercharge claim referred to the Household Goods Carriers' Bureau ("HGB") Mileage Guide Tariff for distances. However, since Silvey did not execute a power of attorney to participate in the HGB, the Magistrate held that Silvey's tariff was void as a matter of law relying on *Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 246 (1992) and *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, No. 91-1507 (5th Cir. June 26, 1992), *withdrawn and op. replaced on reh'g*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). The District Court affirmed the Magistrate's Report and entered summary judgment for H.J. Heinz on January 27, 1993. The Third Circuit Court of Appeals affirmed the District Court based on its earlier opinion in *Security Services, Inc. v. K Mart Corporation*, No. 92-1833, subsequently reported at 996 F.2d 1516 (3rd Cir. 1993). The Third Circuit entered judgment on August 23, 1993.

REASONS FOR GRANTING THE WRIT

The Issue Herein Is Identical To The Issue In *Security Services v. K MART*

This Court's recent acceptance of *Security Services, Inc v. K Mart* presents the same issue and will be dispositive of the case at bar. *Security Services, Inc v. K Mart*, 996 F.2d 1516 (3rd Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct.

18, 1993) (No. 93-284). Respondent agrees with Petitioner that this Court should grant *certiorari* in this case, but stay all briefing until the Court issues its opinion in *Security Services, Inc. v. K Mart* scheduled for oral argument on February 28, 1994.

CONCLUSION

For the foregoing reasons, the Petition of Silvey should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

WILLIAM J. AUGELLO*
MARIANNE ROWDEN
AUGELLO, PEZOLD & HIRSCHMANN
24 Woodbine Avenue, Suite 8
Northport, New York 11768
(516) 261-0100

Counsel of Record

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